(4)

No. 95-566

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN ALLIANCE FOR RIGHTS AND RESPONSIBILITIES AND THE NEW YORK CHAPTER OF PARENTS OF MURDERED CHILDREN AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Pursuant to Rule 36.1 of the Rules of this Court, amici curiae American Alliance for Rights and Responsibilities ("AARR") and the New York Chapter of Parents of Murdered Children ("POMC"), respectfully move for leave to file the accompanying brief as amici curiae in support of petitioner. Petitioner has consented to the filing of the brief; however, counsel for Respondent has denied consent.

INTEREST OF THE AMICI CURIAE

AARR is a national nonprofit organization founded to foster civic and community life and to promote individual responsibility. The fundamental basis of individual

responsibility is accountability for the consequences of one's own conduct. Consequently, the AARR has a substantial interest in and a unique perspective regarding issues of personal accountability, particularly when they involve the use of intoxicants in a manner that endangers the public.

The AARR has been actively involved in efforts to deter and prevent irresponsible uses of drugs and alcohol. The AARR, for example, has had extensive experience assisting community groups in closing down local drug hubs and eradicating open-air drug markets. It has provided legal and technical assistance to public housing tenants and managers in combating drug markets and other street-level problems and has conducted training sessions for anti-crime and tenant groups.

The AARR has also promoted and defended a variety of measures designed to improve the quality of urban life, to promote safe public spaces, and to foster individual accountability. For instance, the AARR helped draft anti-aggressive-solicitation measures that are currently in place in Washington, Baltimore, Berkeley, Cincinnati, Santa Cruz, and Long Beach. The AARR has defended similar ordinances in court and has published numerous articles and opinions-editorials appearing in major newspapers on the subject. The AARR has also defended drug-related evictions, security searches in public housing, and regulations on urban camping.

Throughout its efforts, AARR has been guided by the principle that individuals should take charge of their lives and be held responsible for their behavior. Consistent with that belief, the organization has supported efforts designed to create and maintain an urban environment where residents and visitors are safe, businesses can thrive, and individuals can realize their full potential.

POMC is a local chapter of a national organization formed to provide support for the surviving families of

murder victims. It supports public policies that help to protect families and children from violence.

Amici perceive a danger in the message sent by the Montana Supreme Court's decision in this case; namely, that a person who engages in antisocial, violent and even deadly conduct may rely on his self-induced intoxication to excuse or diminish his responsibility for that conduct. That message is an anathema to amici, who instead believe that the criminal law should be used to emphasize personal responsibility, deter antisocial conduct, and protect innocent victims from the harms caused by others.

Amici are further concerned about the broader legal implications of this case. Like Montana, other States have attempted to limit the use of evidence of voluntary intoxication in determining criminal culpability. Amici support these efforts because, in our view, such rules tend to prevent individuals from avoiding responsibility for the consequences of their actions, which results in a safer society overall. If this Court were to affirm the Montana Supreme Court's judgment, however, the constitutionality of analogous laws could be called into question, and States might be deterred from enacting similar provisions. That result would hamper AARR's efforts to foster notions of personal accountability in the criminal law.

For the foregoing reasons, the motion of AARR and POMC to file the accompanying brief as amici curiae in support of Petitioner should be granted.

Respectfully submitted.

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TABLE OF CONTENTS

TABLE OF CONTENTS — Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES — Continued

TABLE OF AUTHORITIES — Continued

TABLE OF AUTHORITIES — Continued

TABLE OF AUTHORITIES — Continued

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INTEREST OF THE AMICI CURIAE

The interest of the amici curiae is described in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

The Montana legislature has decided that those who commit crimes while voluntarily intoxicated should be punished the same as those who commit crimes while sober. There is substantial justification for such a rule: the harm to society is the same regardless of whether the miscreants are sober or drunk, holding individuals responsible for the consequences of their conduct may deter them from becoming excessively inebriated and injuring others, and there is a high

correlation between alcohol abuse (as well as other drug abuse) and criminal behavior. Most important for the purposes of this case, this decision is well within the authority left to the States under the United States Constitution.

In our federal system, state legislatures have extensive authority to decide which conduct to condemn as "criminal." This authority is especially broad when the behavior to be sanctioned is harmful to society, and the actor is morally blameworthy when judged by contemporary community standards. Both are true of crimes committed by voluntarily inebriated individuals. The grossly intoxicated are dangerous because they reduce their capacity for taking dangers into account and for exercising self-restraint. Moreover, our society has long viewed voluntary intoxication as a vice, and throughout our history public drunkenness has been a crime.

As a matter of public policy, therefore, the Montana legislature enacted Montana Code § 45-2-203 to prevent evidence of self-induced intoxication from being considered to negate a finding that a defendant acted with the requisite criminal intent. By so doing, the legislature merely abandoned a rule that evolved in some States during the middle to late nineteenth century providing that such evidence *could* be offered for that purpose. At that time, evidence of voluntary intoxication was permitted only in cases involving crimes requiring proof of "specific" intent, even though the evidence might be equally relevant to many crimes requiring "general" intent. This illogical dichotomy developed because the rule was not firmly grounded on fundamental notions of criminality, but rather evolved as an expedient method by which to implement a policy judgment that held sway in the latter half of the nineteenth century: that those who commit crimes while intoxicated should be punished less severely than those who commit crimes sober. Not all agreed, however, and the rule was not, and still has not been, universally adopted among the States.

Indeed, the tide of public opinion has apparently turned, as evinced by the fact that some States, like Montana, are revisiting old notions about the appropriate punishment for those who intentionally use drugs (including alcohol), dull their senses, and harm others. It also reflects a growing political consensus underscoring the public importance of encouraging individual citizens to assume greater accountability for their conduct. The Montana legislature thus decided as a matter of policy that it no longer wanted to distinguish those who kill with purpose or knowledge while sober from those whose only defense to "purposeful" and "knowing" murder would be their voluntary intoxication. Although legal philosophers might differ as to the relative moral culpability of the sober and the intoxicated criminal, this Court has indicated that the extent to which blameworthy conduct should be punished, short of the death penalty, is a matter of legislative discretion. Thus, § 45-2-203 is not unconstitutional, regardless of whether it is viewed as a substantive change to Montana's criminal law or as a new rule of evidence.

ARGUMENT

By enacting § 45-2-203, Montana sought to amend its criminal law in light of contemporary values, as perceived by its elected legislators. In particular, Montana decided to hold its citizens fully responsible for otherwise criminal conduct, regardless of whether they act while sober or intoxicated. Nothing in the United States Constitution prevents a State from treating voluntary intoxication as supplying the element of moral culpability that justifies holding a person criminally responsible for the consequences of his injurious actions. The State had ample constitutional authority to implement that policy, whether the statute is viewed as amending the elements of Montana's substantive criminal law or as merely defining the type of evidence considered legally acceptable. In fact, not long ago this Court again "emphasized the preeminent role of the States in preventing and dealing with

crime and the reluctance of the Court to disturb a State's decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced in the courts." *Martin* v. *Ohio*, 480 U.S. 228, 232 (1986).

I. THE DUE PROCESS CLAUSE DOES NOT RESTRICT A STATE LEGISLATURE'S AUTHORITY TO DEFINE A CRIME, INCLUDING HOMICIDE, IN A MANNER THAT MAKES EVIDENCE OF VOLUNTARY INTOXICATION IRRELEVANT.

A. Section 45-2-203 Redefines the Mens Rea Element of Crimes in Which the Accused Would Otherwise Claim that Voluntary Intoxication Prevented Him From Forming the Requisite Intent.

State legislatures are afforded wide latitude in determining the type of behavior that they choose to punish as "criminal." See *Powell* v. *Texas*, 392 U.S. 514, 535-36 (1968). At the core of this autonomy is the States' responsibility for the underlying value judgment "to determine the extent to which moral culpability should be a prerequisite to conviction of a crime." *Id.* at 545 (Black, J., concurring). This legislative discretion includes deciding whether and to what extent various mental states such as "knowledge" or "purpose" should be included as elements of a particular crime. See *Lambert* v. *California*, 355 U.S. 225, 228 (1957) ("There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition."); *Chicago, B. & Q. Ry. Co.* v. *United States*, 220 U.S. 559, 578 (1911) ("The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned.").

This Court, therefore, has found constitutional various laws that hold people accountable for harmful conduct, regardless of their actual intent. See, *e.g.*, *United States* v.

Park, 421 U.S. 658 (1975); *United States* v. *Dotterweich*, 320 U.S. 277 (1943).[1] Indeed, the Court has emphasized that it "has never articulated a general constitutional doctrine of mens rea." *Powell*, 392 U.S. at 535; see also *Lambert*, 355 U.S. at 228 ("We do not go with Blackstone in saying that 'a vicious will' is necessary to constitute a crime * * *, for conduct alone without regard to the intent of the doer is often sufficient.").

The Montana statute under review falls well within the boundaries of state legislative discretion to define criminal culpability for injurious conduct. Section 45-2-203 provides that "an intoxicated condition * * * may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when" it was ingested. When applied to § 45-5-102(1), the homicide statute under which Respondent was convicted, § 45-2-203 makes evidence of intoxication irrelevant in determining whether a defendant purposefully or knowingly caused the death of another human being.

The Montana Supreme Court held that, by so doing, § 45-2-203 ran afoul of the Due Process Clause, as it lessened the State's burden in establishing a mental element of the crime. See Pet. App. 16a. That conclusion, however, rested on a misunderstanding of the principles that this Court has established, which did not require the state court to view the statute as unconstitutionally relieving the prosecution of proving every element of a crime beyond a reasonable doubt.

Contrary to the state court's conclusion, § 45-2-203 — unlike the Maine statute held unconstitutional in *Mullaney* v.

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[1] Strict liability for certain crimes has wide antecedents in Anglo-American law. See, *e.g.*, *Regina* v. *Prince*, 2 L.R.-Cr. Cas. Res. 154 (1875) (taking girl under age of consent); *White* v. *State*, 185 N.E. 64 (Ohio 1933) (abandoning pregnant wife).

Wilbur, 421 U.S. 684 (1975) — does not lessen the State's burden to prove every element of a deliberate homicide beyond a reasonable doubt. Montana must still present evidence from which a reasonable factfinder could conclude beyond a reasonable doubt that, among other things the accused "purposely or knowingly cause[d] the death of another human being." "No further facts are either presumed or inferred in order to constitute the crime." *Patterson* v. *New York*, 432 U.S. 197, 205-06 (1977).

Rather than altering the State's burden of proof as to an essential element of the crime, § 45-2-203 effectively *amends* the mens rea element of the crime of deliberate homicide to preclude the *effects* of voluntary intoxication from negating mens rea. The State court apparently — but erroneously — viewed this Court's precedents on the burden of proof as foreclosing the legislature from declaring, as Montana has done, that murder consists of either killing another person with actual "knowledge" or "purpose" *or* causing death under circumstances that would otherwise establish knowledge or purpose "but for" voluntary intoxication. The Due Process Clause, however, allows a State to restructure the substantive elements of a crime in this way.

B. Section 45-2-203 Has Substantial Historical Roots and Contemporary Acceptance.

This Court has repeatedly referred to history and the current practice of the States as important guideposts in discerning due process' requirement of fundamental fairness and rationality. See *Schad* v. *Arizona*, 501 U.S. 624, 640 (1991) (plurality); *id.* at 650 (Scalia, J., concurring in part and concurring in the judgment). Section 45-2-203 finds acceptance in both our legal past and present.

1. The development of mens rea in the criminal law.

Holding people accountable for the consequences of their conduct is nothing remarkable or new in the history of our law. In Anglo-Saxon law, people were held responsible, regardless of intent, for any act that hurt another — thus, it was said, "[a] man *acts* at his peril." 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 51-53 (1982). The law focused primarily on compensating (and providing vengeance to) the injured to avert a blood feud. Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 975 (1932). Primitive English law, therefore, "started from a basis bordering on absolute liability." *Id.* at 977.

In the twelfth and thirteen centuries, increased influence of the ecclesiastical courts and renewed interest in Roman law combined to elevate the importance of mens rea in English criminal law. *Id.* at 977, 982-84. "The canonists had long insisted that the mental element was the real criterion of guilt and under their influence the conception of subjective blameworthiness as the foundation of legal guilt was making itself strongly felt." *Id.* at 980. Around the same time, legal scholars, such as Bracton, showed renewed interest in Roman law, which emphasized notions of moral fault. *Id.* at 982-83; *see* M. RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 243 (1936). By the time of Henry II, therefore, the king's courts found it important to inquire whether an accused had a "mens rea," or guilty intention, in determining whether a crime had been committed. RADIN, *supra*, at 242-43; 8 HOLDSWORTH, *supra*, at 433-38.

In its early form, the concept of mens rea was exceedingly vague, requiring only a general sense of moral blameworthiness. Sayre, *supra*, 45 Harv. L. Rev. at 994. Over time, however, courts refined the mental element required for each felony, see *ibid.*, and grouped the elements into broader categories, referred to as crimes of "general" and "specific" intent.

As the concept of moral blameworthiness grew in importance in the English criminal law, courts for the first time were forced to grapple with instances in which harm was caused by a person with a diminished mental capacity. As it seemed inequitable in some circumstances to punish a person for a result that, through no fault of his own, he could not, or did not, intend, the common law began to recognize several exculpatory concepts, including infancy, insanity, compulsion, and coercion. See Sayre, *supra*, 45 Harv. L. Rev. at 989, 1004-13. Significantly, however, the law did not recognize voluntary intoxication as even a possible excuse for criminal conduct until much later.

2. The development of the use of evidence of voluntary intoxication to mitigate punishment of inebriated offenders.

"The early common law apparently made no concession whatever because of intoxication, however gross * * *." Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1046 (1944); see IV W. BLACKSTONE, COMMENTARIES 26; Singh, *History of the Defense of Drunkenness in English Common Law*, 49 L.Q. Rev. 528, 535 (1933). Several reasons were advanced in support of holding the voluntarily intoxicated responsible for their actions. Some commentators and courts reasoned that an inebriant should not be held less culpable because his "'ignorance was occasioned by his own act and folly.'" *State* v. *Stasio*, 396 A.2d 1129, 1135 (N.J. 1979) (quoting *Reniger* v. *Fogossa*, 75 Eng. Rep. 1, 31 (K.B. 1551)); see Singh, *supra*, 49 L.Q. Rev. at 530 (quoting LORD BACON, ELEMENTS OF THE COMMON LAWS OF ENGLAND 29 (1636 ed.)). Others reasoned that the "disability" was easy "to counterfeit." See Hall, *supra*, 57 Harv. L. Rev. at 1047 (citing 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 32 (1796)). Still others feared the potential harm to society that would occur if drunks could avoid responsibility for their conduct: "There could rarely be a conviction for homicide if

drunkenness avoided responsibility." See *ibid.* (quoting 1 F. WHARTON, CRIMINAL LAW 95 (1932)).

The prevailing wisdom of the day as of the time our Constitution was adopted was that voluntary intoxication actually "aggravated" the underlying crime. As Justice Story noted:

> "Drunkenness is a gross vice, and, in the contemplation of some of our laws is a crime; and I learned in my earlier studies, that so far from its being in law an excuse for murder, it is rather an aggravation of its malignity." *United States* v. *Cornell*, 25 Fed. Cas. No. 14,868 (C.C.D.R.I. 1820).[2]

This view was apparently based on the Aristotlean notion that "two antisocial acts were committed: getting drunk and causing the harm to others." Paulsen, *Intoxication as a Defense to Crime*, 1961 Ill. L.F. 1, 9 (citing Aristotle, *Ethics*, bk. III, chap. 5, 1113b, 31); see *State* v. *Tatro*, 50 Vt. 481, 490 (1878). Although it is unclear whether any sentences were actually enhanced because an accused was drunk, see 14 Am. Dig. § 66 (citing cases), it is clear that, until the nineteenth century, the law of criminal responsibility of inebriates remained consistent: courts did not permit juries to consider evidence of voluntary intoxication in determining a defendant's criminal intent.

The case of *Rex* v. *Grindley*, decided by Justice Holroyd in 1819, marked a sea change in the law of voluntary

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[2] See also IV W. BLACKSTONE, COMMENTARIES 25-26 ("[A]s to artificial, voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary phrenzy; our law looks upon this as an aggravation of the offense, rather than as an excuse for any criminal misbehavior."); Singh, *supra*, 49 L.Q. Rev. at 531 (listing Coke, Chitty, and Russell as proponents of this rule).

intoxication. See Hall, *supra*, 57 Harv. L. Rev. at 1048 (discussing case). In that case, it was suggested for the first time that whether a defendant was drunk was a material fact in determining premeditation. *Ibid.*; 8 HOLDSWORTH, *supra*, at 442. Sixteen years later, in *Rex* v. *Carroll*, 173 Eng. Rep. 64, 65 (N.P. 1835), Justice Park repudiated Justice Holroyd's statement of law and claimed that Justice Holroyd himself had retracted his position, Hall, *supra*, 57 Harv. L. Rev. at 1048; 8 HOLDSWORTH, *supra*, at 442 n.8, but the seed had already been planted.

By the middle to the latter half of the nineteenth century, Justice Holroyd's idea was apparently taking root in some quarters, albeit slowly. Hall, *supra*, 57 Harv. L. Rev. at 1049; 8 HOLDSWORTH, *supra*, at 442-43. Many courts thought the rule logical when applied to a defendant who was accused of a crime of specific intent or premeditation. If a defendant was grossly intoxicated, courts reasoned, how could he form the requisite specific intent, or plot murder? Moreover, courts had been troubled by the supposedly harsh results that followed from excluding evidence of voluntary intoxication: the law punished equally those who killed by design and those who killed while in a drunken stupor. Permitting evidence of voluntary intoxication to rebut premeditation or specific intent to commit a crime allowed courts to convict defendants of crimes requiring only general intent, for which, especially in the case of homicide, the penalties were less severe. See Hall, *supra*, 57 Harv. L. Rev. at 1050-51; W.R. LEFAVE & A.W. SCOTT, JR., CRIMINAL LAW § 4.10, at 391 (2d ed. 1986). This distinction often spelled the difference between a capital offense and one with less drastic punishment. Thus, permitting evidence of voluntary intoxication to negate a defendant's specific intent to commit a crime provided courts with an avenue to allow the "long-desired mitigation of punishment of grossly inebriated homicides." Hall, *supra*, 57 Harv. L. Rev. at 1049.

As of July 1868, when the 14th Amendment was ratified, the various states took many different approaches to the relevance of evidence of voluntary intoxication. Some States still adhered to the common law approach.[3] Others, such as Texas, limited consideration of evidence of involuntary intoxication to the sentencing phase.[4]

The trend emerging in the majority of the States, though, was to allow juries to consider evidence of voluntary intoxication when considering whether a defendant acted with premeditation or with the specific intent to commit a particular crime. Thus, by 1878 it could be said that, as a matter of policy shifts, "the great weight of recent American decisions is to the effect that intoxication may be considered as a factor in determining whether the accused was capable of forming a specific intent, when the intent is of the essence of the crime charged."[5] Even while permitting the accused to offer such evidence to negate the mens rea needed for a specific intent crime, however, courts uniformly continued to recite the common law mantra that "voluntary drunkenness

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[3] See 14 Am. Dig. § 67, at 678-82 (citing cases); see, *e.g.*, *Harris* v. *United States*, 8 App. D.C. 20, 29 (1896); *McDaniel* v. *State*, 356 So. 2d 1151, 1158 (Miss. 1978) (noting that rule remained in effect until 1932); *State* v. *Harlow*, 21 Mo. 446, 458 (1855); *People* v. *Rogers*, 18 N.Y. 2, 9 (1858) (stating that it "is not law" that jury should be instructed to consider intoxication of defendant in determining intent with which homicide was committed); *People* v. *Register*, 457 N.E.2d 704, 709 (N.Y. 1983) (noting that, in 1881, New York modified rule by statute), cert. denied, 466 U.S. 953 (1984); *State* v. *McCants*, 1 Speers 384, 392-95 (S.C. 1842); *State* v. *Tatro*, 50 Vt. 481, 491 (1878).

[4] See, *e.g.*, *Houston* v. *State*, 14 S.W. 352 (Tex. App. 1883); see also 14 Am. Dig. § 65, at 677-78 (citing cases).

[5] Note, *Intoxication as a Defense to Crime — Degrees of Crime*, 50 Vt. 493, 493 (1878).

neither excuses nor justifies crime." 14 Am. Dig. § 65, at 675-78 (citing numerous cases). The rule therefore operated primarily to mitigate the sentence — but not negate the culpability — of those who committed crimes while voluntarily intoxicated.

> "It is only within the fairly modern times, with the growing realization that criminal liability is to be sharply differentiated from moral delinquency, that intoxication has been allowed as an indirect defense in so far as it negatives the existence of a specific intent required for certain crimes." Sayre, *supra*, 49 L.Q. Rev. at 1015.

It remains the majority rule in America today that voluntary intoxication mitigates but does not negate criminal responsibility. But some States, including Missouri,[6] South Carolina,[7] and Virginia,[8] have decided to retain the common law approach that prevailed before the latter half of the nineteenth century, denying any mitigating effect at all to voluntary intoxication. As illustrated by the case now before the Court, other States, including Montana, Hawaii,[9] Mississippi,[10] New Jersey,[11] and Pennsylvania,[12] recently

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[6] *State* v. *Richardson*, 495 S.W.2d 435 (Mo. 1973) (en banc).

[7] *State* v. *Vaughn*, 232 S.E.2d 328 (S.C. 1977).

[8] See *Chittum* v. *Commonwealth*, 174 S.E.2d 779 (Va. 1970) (evidence of voluntary intoxication inadmissible to negate element of specific intent of the offense; evidence is admissible to rebut deliberation or intent in murder charge).

[9] See *State* v. *Souza*, 813 P.2d 1384 (Haw. 1991).

[10] See *McDaniel* v. *State*, 356 So. 2d 1151 (Miss. 1978).

[11] See *State* v. *Stasio*, 396 A.2d 1129 (N.J. 1979).

have decided to restore the no-mitigation rule, either in whole or in part.

C. The Willingness of Some States to Treat Voluntary Intoxication as a Legitimate Basis for Rebutting Mens Rea in Crimes of Specific Intent Represents Transient Notions of Public Policy, Not Fundamental Tenets of the Criminal Law Required by the Due Process Clause.

The decision by many States to view voluntary intoxication as a permissible basis for negating mens rea in specific-intent crimes is a creature of policy, which evolved during the nineteenth century in some states to mitigate the perceived harshness of sentences that the common law rule otherwise would have imposed on inebriated offenders. Adoption of this principle reflected changing societal perceptions regarding the criminality and immorality of alcohol use, which softened somewhat in the nineteenth century as compared to the early English law. Courts and legislatures were able to effect this policy primarily through the common law's legal fiction of general and specific intent crimes.[13]

That the doctrine is more akin to a sentencing scheme than a fundamental concept relevant to a defendant's guilt or innocence can be discerned by considering its logic and effect. Professor Hall has written, in particular, about the

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[12] Cf. *Commonwealth* v. *Rumsey*, 454 A.2d 1121 (Pa. Super. Ct. 1983) (evidence of voluntary intoxication inadmissible to negate element of intent, except when relevant to reduce murder from higher to lower degree).

[13] The distinction between "specific" and "general" intent is a legal fiction, not psychological fact; "the paramount fact is that neither common experience nor psychology knows any such actual phenomenon as 'general intent' that is distinguishable from 'specific intent.'" Hall, *supra*, 57 Harv. L. Rev. at 1064.

lack of logical consistency in the application of this rule in cases involving homicide. See generally Hall, *supra*, 57 Harv. L. Rev. at 1048-54; see also Note, *Alcohol Abuse and the Law*, 94 Harv. L. Rev. 1660, 1681-82 (1981).

In a majority of the States where the severity of murder is defined in degrees, for example, the successful invocation of the doctrine results in conviction for second degree murder, a general intent crime. The defendant cannot be convicted of first degree murder (a crime requiring proof of "specific intent" or premeditation), if the defendant was too intoxicated to form the requisite intent. The result is different in cases where the issue is whether voluntary intoxication reduces a charge of second degree murder to voluntary manslaughter (which could typically be accomplished by establishing that the killing was in response to a legal provocation), even though this ignores "the admitted fact that drunken persons are more easily aroused and lose self-control more readily than do sober ones." Hall, *supra*, 57 Harv. L. Rev. at 1052.[14] As this illustration makes clear, the rule allowing a jury to consider voluntary intoxication in prosecutions for specific-intent crimes — but only in such crimes — is a device used to achieve a certain policy objective: to try to calibrate punishment consistently with a particular view of the relative moral culpability of a person who commits homicide while voluntarily intoxicated.

In *State* v. *Stasio*, 396 A.2d at 1132-36, the New Jersey Supreme Court relied in part on the artificiality of the specific/general intent distinction in deciding to treat voluntary intoxication as irrelevant to the issue of a defendant's purpose or knowledge. The court reasoned that dogmatic adherence to the artificial and strict distinctions between general and specific intent crimes "undermines the criminal law's primary function of protecting society from the

[14] See LEFAVE & SCOTT, *supra*, § 7.4(b), at 621 & n.34.

results of behavior that endangers the public safety." *Id.* at 1134. The court explained that the protection of society

> "should be our guide rather than concern with logical consistency in terms of any single theory of culpability, particularly in view of the fact that alcohol is significantly involved in a substantial number of offenses. The demands of public safety and the harm done are identical irrespective of the offender's reduced ability to restrain himself due to his drinking." *Ibid.*

Further proof that the relevance of voluntary intoxication to criminal culpability involves solely a policy choice appears in the commentary accompanying the discussion of culpability based on recklessness in the Model Penal Code ("MPC"). The drafters of the MPC conceded that intoxication could be logically relevant to disproving awareness of risk, which is the yardstick against which recklessness is measured. MODEL PENAL CODE § 2.08 commentary at 8-9 (Tentative Draft No. 9, 1959). They nonetheless recommended that evidence of this condition be excluded from consideration in crimes requiring only a showing of recklessness, noting several strong policy considerations that demand this result despite the arguable relevance of intoxication to the underlying element of guilt.

In light of its history and illogic, the rule that permitted defendants to show self-induced intoxication to negate intent in specific intent crimes is not a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson* v. *New York*, 432 U.S. 197, 202 (1977). Indeed, as the drafters of the MPC reasoned in analogous circumstances, the rule is nothing more than "a special rule of liability" derived from competing policy concerns.[15] As such, it is precisely the type of tool

[15] MODEL PENAL CODE, *supra*, § 2.08 commentary at 9; see

that this Court has recognized that States may use to "adjust[ ] * * * the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man." *Powell*, 392 U.S. at 536.

D. Section 45-2-203 is Rational and Fair.

The rule established by § 45-2-203 is rational and fair and, therefore, is a sensible option for State legislatures seeking to cope with the continuing problem of crimes committed by the voluntarily intoxicated.

1. Section 45-2-203 promotes important and legitimate objectives and is consistent with the primary aims of the criminal law.

The criminal law serves many purposes, including the prevention of antisocial conduct, the enhancement of a sense of security throughout society, and the rehabilitation of offenders. See generally Hart, *The Aims of the Criminal Law*, 23 L. & Contemp. Probs. 401, 401 (1958). These important goals are fostered by § 45-2-203.

By holding individuals responsible for the consequences of their conduct while intoxicated, § 45-2-203 discourages two types of antisocial and potentially dangerous behavior: drinking to excess, and injuring others while grossly intoxicated. The provision also promotes public safety by reducing through deterrence or incarceration the number of people who might cause harm because they voluntarily diminish their capacity to appreciate or control their behavior.

Hall, *supra*, 57 Harv. L. Rev. at 1054 (noting that the concept of a "general intent" crime in this context merely reflects a legal fiction designed to accommodate a policy judgment distinguishing the moral culpability of a drunken homicide from that of a sober person effecting a like injury, while at the same time insisting that a person who voluntarily indulges in alcohol should not escape all criminal culpability for causing injury while intoxicated).

Although it certainly is not the case that all those who ingest intoxicants are likely to commit a violent crime, it is equally certain that many do, as a large number of violent crimes are committed by those who are intoxicated. Studies suggest that alcohol consumption is associated with 62% of aggravated assaults, and half of all spouse abuse, reported rapes, and homicides.[16] By holding the voluntarily intoxicated criminally responsible for their actions, § 45-2-203 operates to remove from society potentially dangerous persons who have demonstrated that they are either unable or unwilling to conform their behavior when they are intoxicated. As one trial judge put it, "[m]any people get drunk but when honest people get drunk they do not go out and commit crimes" (quoted in *Heideman* v. *United States*, 259 F.2d 943, 948 n.4 (D.C. Cir. 1958) (Bazelon, J., dissenting), cert. denied, 359 U.S. 959 (1959)). The "isolation of the dangerous has always been considered an important function of the criminal law." *Powell*, 392 U.S. at 539 (Black, J. concurring).

The Montana provision also promotes respect for the law, another legitimate goal of the criminal justice system, by preventing miscreants from receiving a benefit because of another misdeed. As Justice Story put it when responding to the argument that evidence of voluntary intoxication ought to be admitted to rebut intent to murder, "[t]his is the first time, that I ever remember it to have been contended, that the commission of one crime was an excuse for another." *United*

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[16] See National Institute on Alcoholism and Alcohol Abuse, Report to Congress (1983); National Institute on Alcoholism and Alcohol Abuse, Sixth Report to Congress (1987); Office of Substance Abuse Prevention, Prevention Plus II: Tools for Creating and Sustaining Drug-Free Communities (1989); see also Note, *supra*, 94 Harv. L. Rev. at 1681-82 ("About half of homicide perpetrators and victims are to some extent under the influence of alcohol at the time of the incident.").

States v. *Cornell*, 25 Fed. Cas. No. 14,868 (C.C.D.R.I. 1820).[17]

Section 45-2-203 thus is good for society in general and, in a profound penological way, for the accused in particular, since it teaches them that they must become responsible for their acts. Professor Henry Hart has explained:

> "Man learns wisdom in choosing by being confronted with choices and by being made aware that he must abide the consequences of his choice * * *. [I]t is the criminal law which defines the minimum conditions of man's responsibility to his fellows and holds him to that responsibility. The assertion of social responsibility has value in the treatment even of those who have become criminals." Hart, *supra*, 23 L. & Contemp. Probs. at 410.

2. Section 45-2-203 is not fundamentally unfair to defendants.

a. Fair Notice of Culpability. There is nothing fundamentally unfair about holding people criminally liable for the harm they caused while in a drunken stupor. A person in Respondent's position cannot seriously contend that he lacked notice that his conduct was criminally culpable. The Montana statute that Respondent challenges expressly warned that he would face full criminal responsibility if he drank himself into a stupor and killed someone.

[17] See also *Harris* v. *United States*, 8 App. D.C. 20, 26 (1896) ("[I]t would be subversive of all law and of all morality if the commission of one vice or crime could be permitted to operate as an excuse or palliation for another crime."); *State* v. *Harlow*, 21 Mo. 446, 458 (1855) (opining that "it is considered criminal for a man to make himself a drunkard; one crime never yet justified the commission of another").

This sensible declaration of what society expects from its members is hardly a local aberration. At common law, for example, evidence of voluntary intoxication was irrelevant in determining whether an accused was guilty of a "depraved heart" murder, see LEFAVE & SCOTT, *supra*, § 4.10(b), at 391, or killed in self-defense, see *id.* § 4.10(d), at 393. This was true even though gross intoxication may have been a significant factor contributing to the defendant's extremely reckless conduct or to the defendant's inability to discern the true nature of a threat he faced and to devise a more measured response. Thus, if a person got drunk and killed someone in a fit of extreme recklessness, the law would punish the inebriated offender no differently from a sober person who did the same thing. Reflecting the same public policy, the law of torts, which also rests on notions of personal fault, does not relieve a person of liability because he or she harmed others or their property while voluntarily intoxicated.[18]

b. Ample Notice of Societal Risk. Moreover, for generations the general public has been aware that intoxication and criminal misconduct often go hand in hand. In 1959, for example, the drafters of the MPC noted that the public awareness of the potential consequences of excessive drinking on a person's ability to gauge risk is "dispersed in our culture," and thus, the drafters reasoned, it would not be unfair to disregard evidence of involuntary intoxication when

[18] 3 F.V. HARPER, F. JAMES & O.S. GRAY, THE LAW OF TORTS § 16.7, at 426 (2d ed. 1986) (noting that "voluntary intoxication is generally said to be no excuse for acts or omissions that fail to conform to the conduct of a reasonable and sober person."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 178 (5th ed. 1984) (stating that it is "uniformly held" that voluntary intoxication "cannot serve as an excuse for acts done in that condition which would otherwise be negligent").

determining whether a defendant was guilty of reckless homicide.[19] More recently, many States' highly publicized drunk-driving campaigns have reminded citizens that stiff penalties are imposed for dangerous, drunken conduct.

c. Adequacy of Personal Fault. One who kills while voluntarily intoxicated cannot be heard to complain that he is blameless and thus undeserving of condemnation or punishment. To begin with, "[p]ublic drunkenness has been a crime throughout our history, and even before our history it was explicitly proscribed by a 1606 statute, 4 Jac. 1, c.5. It is today an offense in every State in the Union." *Powell*, 392 U.S. at 538 (Black, J. concurring). Our society has consistently recognized, to varying degrees depending on the prevailing mores of the day, the moral blameworthiness of self-induced intoxication.[20]

Such conduct is culpable in another way; it foreseeably endangers other members of society, not just the substance abuser. As Professor Paulsen has explained: "Through a choice, of the sort normally operative in the law, the inebriate has increased the risk of harm to others by reducing his own capacity for taking dangers into account and for controlling himself." Paulsen, *supra*, 1961 Ill. L.F. at 5. It has been

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[19] MODEL PENAL CODE, *supra*, § 2.08 commentary at 9. More than 40 years ago, another commentator posited that "[w]idespread knowledge as to effects of alcohol suggest that everyone should normally be responsible for the acts he commits." Note, *Intoxication as a Criminal Defense*, 55 Colum. L. Rev. 1210, 1218 & n.58 (1955).

[20] See, *e.g.*, *Harris* v. *United States*, 8 App. D.C. 20, 26 (1896) ("Voluntary intoxication is itself a crime, at least in morals, if not always in law. It is always at least a vice."); *People* v. *Townsend*, 183 N.W. 177, 179 (Mich. 1921) ("Voluntary drunkenness in a public place was always a misdemeanor at common law; and it was always wrong morally and legally. It is malum in se.").

argued, therefore, that it is fair to hold the intoxicated criminally responsible for whatever harm he may cause, as the very act of endangering others by voluntarily diminishing one's capacity to this extent is worthy of societal condemnation.[21] As the New York Court of Appeals explained in an oft-quoted passage:

> "In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy; and look rather to the maintenance of personal security and social order, than to any accurate discrimination as to moral qualities of individual conduct." *People* v. *Rogers*, 18 N.Y. 9, 18 (1858).

The Court concluded, therefore, that

> "there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellowmen and to society, to say nothing of more solemn obligations, to preserve, so far as it lies in his power, the inestimable gift of reason. * * *. [I]f by a voluntary act he temporarily casts off the restraints of reason and conscience, no wrong is done him if he considered answerable for any

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[21] See 3 F.V. HARPER, F. JAMES & O.S. GRAY, *supra*, § 16.7, at 426 n.14 (noting that a feeling of "moral condemnation" is justified as "the person getting drunk (or stoned) should know that he will thereby subject others to unreasonable risks and is capable of refraining from doing so").

injury which in that state he may do to others or to society." *Ibid.*[22]

The concept of holding a person responsible for one harm because he committed another causally connected "wrong" is not new to the law; indeed, it is the foundation of the doctrines of felony-murder and misdemeanor-manslaughter. The underlying rationale is that an actor's blameworthy conduct in committing a lesser offense is sufficient to import the requisite element of moral blame for the more serious offense. See Hall, *supra*, 57 Harv. L. Rev. at 1067.

This very rationale has been used by some courts to explain why it is not unjust to hold a defendant criminally liable for a homicide, even though the defendant claims that diminished capacity prevented him from forming the requisite men rea: "Intoxication, which is itself a crime against society, combines with the act of killing, and the evil intent to take life which necessarily accompanies it, and all together afford sufficient grounds for implying malice." *State* v. *Johnson*, 41 Conn. 584, 588 (1874); see *State* v. *Stasio*, 396 A.2d 1129, 1131 (N.J. 1979).[23]

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[22] Accord *Harris*, 8 App. D.C. at 28-29; see *Roberts* v. *People*, 19 Mich. 408, 418 (1870) ("He must be held to have purposefully blinded his moral perceptions, and set his will free from the control of reason — to have suppressed the guards and invited the mutiny; and should therefore be held responsible as well for the vicious excesses of the will, thus set free, as for the acts done by its prompting."); *State* v. *Stasio*, 396 A.2d 1129, 1134 (N.J. 1979) ("'[I]f a person casts off the restraints of reason and consciousness by a voluntary act, no wrong is done to him if he is held accountable for any crime which he may commit in that condition. Society is entitled to this protection.'" (quoting *McDaniel* v. *State*, 356 So. 2d 1151, 1160-61 (Miss. 1978)).

[23] A similar rationale is found in tort law: "Sometimes it is said that the negligence consists of getting drunk." 3 HARPER, JAMES & GRAY, *supra*, § 16.7, at 426 n.14; see KEETON ET AL., *supra*, § 32, at 178 ("[D]runkenness is so antisocial that one who indulges in it ought to be held to the consequences").

As the preceding discussion makes clear, this is not a case where the issue is *whether* a defendant's conduct is worthy of condemnation — it clearly is. The accused's alleged mental incapacity resulted from his own culpable conduct, rather than from factors outside his control, unlike the defendant in *Robinson* v. *California*, 370 U.S. 660 (1962). Professor Paulsen has explained the crucial difference:

> "There is a great difference between the insane and the intoxicated. If we put aside cases of insane compulsions to drink (assuming that such cases exist), there is some choice about drinking even in the case of the thirsty. Any choice carries with it responsibility and the particular choice to drink alcohol increases the risk of harm to others." Paulsen, *supra*, 1961 Ill. L.F. at 4.

Nor does this case involve a statute like the one in *Lambert* v. *California*, 355 U.S. 225 (1957), which was found unconstitutional because it punished wholly passive and innocent conduct. Rather, the effect of § 45-2-203 and § 45-5-102(1), taken together, is simply to hold a person responsible for engaging in affirmative acts that endangered society at large and, in this case, snuffed out two human lives. There can be little doubt that this kind of conduct is properly viewed as "blameworthy in the average member of the community." See O. HOLMES, THE COMMON LAW 49-50 (1881).

3. It is not cruel or unusual punishment to hold a defendant responsible for deliberate homicide when he killed while voluntarily intoxicated.

Although not squarely placed in issue by the ruling of the court below, the Eighth Amendment also stands as no obstacle to enforcing Montana's policy. The argument would be that the person who kills while intoxicated is less morally culpable than the person who kills while sober, and thus as a constitutional matter may not be treated in the same way in the eyes of the criminal law. But the Eighth Amendment "does not affect the state's definition of any substantive offense, even a capital offense." *Walton* v. *Arizona*, 497 U.S. 639, 649 (1989). Moreover, the Court has already rejected the argument that the Eighth Amendment — outside the capital punishment context — imposes some theory of "proportionality" on legislative classifications of crimes and punishments or requires "individualized" punishments. *Harmelin* v. *Michigan*, 501 U.S. 957, 995 (1991).

Thus, no provision of the United States Constitution prevents a State from reducing the level of culpability considered sufficient to hold an actor criminally liable for a deliberate homicide. At bottom, the extent to which blameworthy conduct should be punished, short of the death penalty, is a matter of legislative discretion. By leaving such decisions to that political branch, society as a whole can respond to changing mores and advances in the understanding of the human condition. This case provides a good example of the benefits of that flexibility, as it highlights how the criminal law has responded over time to changing societal perceptions of the culpability of those who choose to drink to excess and then injure others. Legislatures should be permitted to continue to do so.

II. THE DUE PROCESS CLAUSE DOES NOT RESTRICT A STATE LEGISLATURE'S AUTHORITY TO PREVENT A JURY FROM CONSIDERING EVIDENCE OF VOLUNTARY INTOXICATION WHEN DETERMINING THE EXISTENCE OF A MENTAL STATE THAT IS AN ELEMENT OF A CRIMINAL OFFENSE.

Even if § 45-2-203 is viewed as a purely evidentiary rule, instead of as a substantive modification to Montana's criminal law, it comports with due process. The argument that evidence of intoxication may be "relevant" to the mental element of a crime does not mean that a State must allow the accused to tender the evidence.

It is well established, for example, that "[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988). The accused's right to present relevant evidence may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. See *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987); *Ohio* v. *Roberts*, 448 U.S. 56, 64 (recognizing a state's "strong interest" in the development and precise formulation of the rules of evidence applicable in criminal proceedings). Examples include the hearsay rule, the attorney-client privilege, the work product doctrine, the priest-penitent privilege, and the doctor-patient privilege, all of which presuppose that the excludable evidence is otherwise "relevant" to a material issue in the prosecution.

A State, of course, may not apply a rule of evidence that *arbitrarily* excludes relevant evidence, see *Rock*, 483 U.S. at 55 (emphasis added); *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973), but a State's decision regarding the procedures under which its laws are carried out "is not subject to proscription under the Due Process Clause unless it 'offends some principle of justice so rooted in the traditions and

conscience of our people as to be ranked as fundamental.'" *Patterson* v. *New York*, 432 U.S. 197, 201-02 (1977) (quotation omitted). It is hardly offensive to any fundamental principle of our system of justice for a State legislature to ban evidence of voluntary intoxication in determining the existence of a mental state that is an element of the offense.

In prescribing a rule of evidence, Montana has more than adequate reasons for deciding not to allow the use of one form of misconduct to undermine otherwise sufficient proof of crime. At the outset, it is not clear that evidence of intoxication is particularly relevant to a factfinder's determination whether an accused committed a crime with the requisite knowledge, purpose or intent. As then-Judge Burger noted, "[d]runkenness, while efficient to reduce or remove *inhibitions*, does not readily negative *intent*." *Heideman* v. *United States*, 259 F.2d 943, 946 (D.C. Cir. 1958), cert. denied, 359 U.S. 959 (1959).[24]

Even if such evidence is marginally relevant to the mental element, it is also unclear whether, as a practical matter, it is actually helpful to the factfinder. It is "extremely difficult" to determine the instant at which a defendant actually lost control of his ability to reason. See MODEL PENAL CODE, *supra*, § 2.08 commentary at 9. Objective measurements of intoxication, such as blood alcohol content, are to little avail, as intoxicating substances affect people differently. For many of these same reasons, some commentators have contended that permitting evidence of voluntary intoxication to negate mens rea "presents an opportunity for spurious claims." Note, *supra*, at 1218 &

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[24] See Hall, *supra*, 57 Harv. L. Rev. at 1065 (noting that a grossly intoxicated person commits very harm he intends, "typically what is lacking is control and ethical sensitivity"); G. WILLIAMS, CRIMINAL LAW, § 182, at 559 (2d ed. 1961) (noting that "alcohol remove[s] inhibition or self-restraint, and impair[s] the appreciation of the consequences of conduct").

n.58; see IV W. Blackstone, COMMENTARIES 26 (noting "how easy it is to counterfeit this excuse"); MODEL PENAL CODE, *supra*, § 2.08 commentary at 9 (noting the relative rarity of cases where intoxication really does engender unawareness as distinguished from imprudence); W. PAGE KEETON ET AL., *supra*, § 32, at 178 (noting that "an excuse based on intoxication would be far too common and too easy to assert").

In light of the evidence's questionable relevance, its limited helpfulness, and the potential for its fraudulent use, its exclusion may actually promote a primary goal of the criminal justice system — accurate factfinding. Similar considerations justify excluding evidence under Rule 403 of the Federal Rules of Evidence, which provides that relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of * * * confusion of the issues, or misleading the jury." A state legislature should have no less discretion on such policy-laden and empirically questionable matters than the Federal Rules entrust to individual trial judges.

Several other important objectives are fostered by excluding such evidence. If evidence of self-induced intoxication is inadmissible to negate intent, then persons will be held accountable for their conduct while intoxicated, which, in turn, tends to deter self-induced intoxication. Deterring undesirable conduct is at the heart of the criminal justice system. See Hart, *supra*, 23 L. & Contemp. Probs. at 401.

Perhaps most important, this kind of exclusionary rule promotes respect for the law. It would be a perverse twist of justice to conclude that the Due Process Clause requires the States to let killers use evidence of one kind of antisocial conduct in order to excuse another injurious act. See IV W. Blackstone, COMMENTARIES 26; *United States* v. *Drew*, 25 Fed. Cas. No. 14,993 (C.C.D. Mass. 1828) (Story, J.).

Finally, as we have already discussed, history and logic belie any contention that the opportunity to use evidence of voluntary intoxication to negate mens rea is a fundamental principle of justice. The willingness to allow this use, even in limited circumstances of "specific intent" crimes, is of relatively recent vintage, and it never achieved universal acceptance. It reflects just one perspective on appropriate sentencing policy, a policy calculated to punish one type of morally blameworthy conduct — crimes committed by the intoxicated — less severely than similar, morally blameworthy conduct when committed by the sober.

States such as Montana, however, surely retain the flexibility to use the laws of evidence to manifest a different public policy; one that does not permit a person who has caused a fatal injury to invoke his own voluntary intoxication to evade responsibility for his misdeed.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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